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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: MAY 22 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. At the time he filed the petition, the petitioner was a [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner claims eligibility for classification as an alien of exceptional ability in the sciences. The record readily establishes that the petitioner, whose occupation requires at least a bachelor's degree and who holds post-baccalaureate degrees, qualifies as a member of the professions holding an advanced degree. An additional determination regarding the petitioner's claim of exceptional ability would be moot. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner filed the Form I-140 petition on June 10, 2010. In an introductory statement, counsel asserts that the petitioner would qualify for classification as an alien of extraordinary ability in the sciences under section 203(b)(1)(A) of the Act, and therefore should also readily qualify for the national interest waiver with its lesser evidentiary demands. The AAO will give submitted evidence due consideration, but will not, in this proceeding, attempt to determine whether or not the petitioner qualifies for classification as an alien of extraordinary ability in the sciences.[1]

Counsel cited *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), in which the court ruled that "neither USCIS nor [the] AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5." *Id.* at 1121. The *Kazarian* decision involved a petition for an alien of extraordinary ability under section 203(b)(1)(A) of the Act. The

[1] The AAO notes that, simultaneously with the petition under discussion, the petitioner also filed a second petition seeking classification as an alien of extraordinary ability in the sciences. The director denied that petition. Counsel appealed that decision on the petitioner's behalf, but later withdrew the appeal.

implementing regulations for that classification include, at 8 C.F.R. § 204.5(h)(3), a list of ten evidentiary criteria. A petitioner seeking that classification must meet at least three of those ten criteria. The court, in *Kazarian*, held that USCIS adjudicators could not modify those requirements. In this proceeding, under different sections of the statute and regulations, there is no comparable list of qualifications. The regulation at 8 C.F.R. § 204.5(k)(4)(ii) provides for the national interest waiver, but is entirely silent as to the requirements for it. In the absence of statutory and regulatory guidance (with the exception of provisions for certain physicians, not applicable here), the only binding law pertaining to the national interest waiver is *NYSDOT*.

Counsel also claims: "The standard for NIW is 'exceptional ability.' . . . a review of this evidence **can only lead to the conclusion that [the petitioner] is a research scientist of exceptional ability doing work in the national interest**" (counsel's emphasis). The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise. Exceptional ability creates no presumption of eligibility for the national interest waiver. It is, rather, a means by which one may qualify to apply for the waiver. Furthermore, the question of whether the petitioner's "work [is] in the national interest" is not identical to the question of whether the petitioner, as an individual, merits the national interest waiver. The basic nature of the work may have intrinsic merit and national scope, but the same would be true for any qualified worker pursuing such research.

Counsel offered some details regarding the petitioner's research work:

> For 13 years, [the petitioner] has been continuously studying stroke, exploring stroke mechanisms, and investigating the appropriate neuroprotectants both clinically and experimentally. He was the first person in the world to put forward the important concept that modeling stroke should be performed in aging animals instead of young rodents because a large plurality of stroke victims are elderly. . . .
>
> [The petitioner] was also the first person who successfully provided a middle cerebral artery occlusion (MCAO) model with aged mice. By doing stroke model in aged animals, [the petitioner] discovered that stroke outcomes are different between aging male and female mice. . . . The sexual dimorphism in stroke [the petitioner] and his colleagues found has greatly contributed to the integrity of our knowledge of mechanisms underlying ischemic stroke, and [the petitioner] is undoubtedly the world's greatest contributor to this theory. . . .
>
> The work that [the petitioner] has done has already earned him an international reputation in the field of stroke research. Without any doubt, he is one of the top

experts in this field, and perhaps the top expert on the subject of gender differences in stroke and stroke outcomes.

To support the petition, the petitioner submitted letters bearing the electronically reproduced signatures of witnesses whom counsel deemed "some of the **world's top research experts**" (counsel's emphasis). For example, [redacted] credited the petitioner with "several important findings, e.g. sex and age related differences of stroke outcomes in young and aging mice." One such finding, "that caspase dependent cell death predominates in female animals after ischemic injury . . . [,] has direct relevance for the development of neuroprotective therapies."

Professor [redacted] who is also chair of the American Stroke Association International Stroke Conference, found that the petitioner's findings "may have important therapeutic relevance" and "will undoubtedly greatly benefit health care in our country."

[redacted] stated that the petitioner's "findings have profound implications for stroke research as certain neuroprotective agents may only work in young male brain, and have no effect in the population most at risk for stroke, aging females. This is a revolutionary approach that is very likely to lead to important results that will move the field forward."

[redacted] stated that the petitioner's "findings . . . have great significance to experimental stroke researchers, and the field in general as most experimental stroke studies have been performed exclusively in young male animals."

Regarding the petitioner's published work, counsel stated that the petitioner "is an extremely well-published author with 21 journal articles, including six abstracts. He has at least 102 citations. His most important articles were published in October of 2009 and April of 2010, and these articles already have at least 19 citations. This is phenomenal for recently published articles."

The record at the time of filing did not support the exact figures provided by counsel, particularly with respect to the petitioner's more recent publications, but the petitioner did document a substantial number of citations, particularly of his holder articles (as would be expected). The petitioner's earliest articles were published in Chinese, as were the citing articles.

On January 12, 2011, the director issued a request for evidence, instructing the petitioner to submit additional evidence of the petitioner's influence in his field, including translations of the Chinese-language citation data. The director did not specify that, under the USCIS regulation at 8 C.F.R. § 103.2(b)(3), the translation must include the translator's certification that the translation is complete and that the translator is competent to translate from the foreign language into English.

In response, the petitioner submitted updated citation figures including electronically generated English translations from the Google Scholar search engine (http://scholar.google.com).

The petitioner submitted copies of new articles along with further letters from recent collaborators, such as [redacted] who stated:

> [The petitioner] is one of the top scientists in the world on stroke. He has excellent studies on ischemic stroke and recently my lab has initiated a very fruitful collaboration with him. . . . In fact, my lab is making significant progress on MCAo [*sic*] suture stroke studies because of the training and expertise provided by [the petitioner].

The director denied the petition on June 16, 2011. The director quoted from the witness letters, and noted that the letters submitted in response to the request for evidence refer to work that the petitioner performed after the petition's filing date, which cannot retroactively establish eligibility as of the filing date. The director cited *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The director acknowledged the petitioner's submission of citation data. The director stated that attempts to verify the English translations of the Chinese citations were unsuccessful. (One such translation identified the principal author of an article as "Tiger Reserve Photo.") The director concluded that the petitioner's "published work has been moderately cited."

On appeal, [redacted] asserts that the petitioner "developed the method to perform MCAO in aging rodents independently, and finally developed the protocol, which is his own original idea and technique." [redacted] also called attention to the increasing citation of the petitioner's work.

Counsel contends that *Katigbak* should not strictly apply in proceedings that take "months or years" to complete, but cites no statute, regulation or case law to support this position. In this proceeding, even disregarding the most recent witness letters, the petitioner's earlier evidence is still consistent with approval of the petition.

Counsel acknowledges error with respect to the "wrongly translated" Chinese citation data, and the petitioner submits new, certified translations of the citation data. With respect to the petitioner's English-language publications, the petitioner submits updated citation figures, along with tables from [redacted] showing the citation rates of papers in the field of neuroscience. Counsel observes that the petitioner's recent papers show citation rates several times greater than the documented averages. These figures are consistent over several papers, rather than applying only to one or two "fluke" papers with high citation rates that raise the average rate for otherwise undistinguished papers. Counsel strongly disputes the director's characterization of the petitioner's citation record as "moderate."

New printouts from citation databases show counsel's figures to be somewhat exaggerated, with one citation double-counted, as well as eleven self-citations by the petitioner's co-authors, but the

remaining citations are sufficient to support counsel's assertion that the petitioner's work is heavily cited. These citations continue a pattern of heavy citation already in place at the time of filing, particularly (at first) with regard to the petitioner's Chinese-language articles.

The record also preponderantly credits the petitioner with innovation of laboratory techniques that other laboratories have adopted, and which have significantly affected the course of ongoing research. In this way, the petitioner has demonstrated the wider influence contemplated in *NYSDOT*.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the AAO will withdraw the director's decision and approve the petition.

ORDER: The appeal is sustained and the petition is approved.